

Getting what you deserve?

An analysis of discretionary support, eligibility and vulnerability in the light of “bedroom tax” appeal cases

We are at a critical point, both politically and legally, in defining who should be viewed as “vulnerable” or “marginalised” and, therefore, deserving of support through the welfare state. The government’s shelved plans to change the calculation of Personal Independence Payments (PIP) have led to much debate (not least within the Conservative Party itself following Iain Duncan Smith’s resignation as work and pensions secretary) about who is in the greatest need and where the line should be drawn between those who require (or deserve) financial help from the state and those who should don’t. Arguably this debate has been most fiercely played out in relation to the “bedroom tax”, affecting working-age tenants renting in the social rented sector who are judged to be under-occupying their property. This article draws on research completed by the social welfare law, policy and advice practice team at Staffordshire University, and looks at discretionary support, eligibility and vulnerability in the light of significant bedroom tax appeal cases including Rutherford and MA and others.

The importance of discretionary housing payments (DHPs) has been highlighted by research into the impact of the bedroom tax (for example see Ipsos MORI 2014ⁱ) and has influenced the outcome of many bedroom tax appeals in the upper courts. The research I conducted at Staffordshire University (with tenants and employees of a large housing association in North Staffordshire) found that local authority DHPs are playing a crucial role in keeping tenants affected by the bedroom tax in their homes. Local Authorities can consider making an award of a DHP where there is a shortfall between the rent charged and housing benefit awarded. Historically these shortfalls have mainly affected private rented tenants but the introduction of the bedroom tax in April 2013 changed this. Research completed by Cambridge Universityⁱⁱ estimates that in the twenty months following the rollout of the bedroom tax 465,000 households in the social rented sector saw their housing benefit reduced.

Despite the significant numbers of tenants affected by the bedroom tax who would potentially benefit from a DHP, participants told Staffordshire University researchers that local authorities do little to promote or publicise the availability of DHPs (“It was by chance I was going on the internet and I saw you can apply for a discretionary payment”). The research highlighted the inconsistent approach of neighbouring authorities. Both tenants and housing professionals perceived Newcastle-under-Lyme Borough Council to administer the DHP scheme in a more flexible and generous way than Stoke-on-Trent City Council. This “postcode lottery” was compounded by inconsistent awards of DHPs by local authorities depending on the time of year in which a claim was made, the quality of evidence supplied to support the claim and changing local and political priorities. The Staffordshire University research clearly highlighted the importance of DHPs to help tenants to cope with the impact of the bedroom tax, and to remain in their home. However, it was also clear that DHPs cannot be relied upon. Unlike other areas of the benefit system applicants do not have a right of appeal to a social security appeal tribunal and must navigate internal review processes laid out by individual authorities.

The results of the research in North Staffordshire broadly reflect the situation elsewhere in England. The latest DHP guidanceⁱⁱⁱ (Discretionary Housing Payments Guidance Manual Including Local Authority Good Practice Guide) states that “LAs have overall responsibility for how DHPs are administered and paid, taking into account the impact of the welfare reforms and any other relevant factors”. However, it is clear that this in no way guarantees that an applicant affected by the bedroom tax will be awarded a DHP. Figures from 2013/14 show that only 60% of all DHP

expenditure in England was awarded to applicants affected by the bedroom tax. There are a wide range of competing demands on the DHP budget. For example, applications can be considered from households at risk of homelessness, claimants subject to the benefit cap and where housing benefit is reduced due to local housing allowance restrictions. To emphasise the arbitrary nature of DHPs, Stoke-on-Trent City Council's own guidance^{iv} states that they will make a "pragmatic decision based on the circumstances of the applicant".

The DWP published details of the 2016/17 DHP budget in February 2016^v. The overall budget has increased by £20 million to £150 million. £60 million (or 40%) of this budget has been allocated for claimants affected by the bedroom tax, although this is not ring-fenced. Authorities are allowed to top up the DHP budget by 2.5 times and it will be interesting to see how many exercise this option. The Scottish Parliament has chosen to top up the DHP budget to completely offset the impact of the bedroom tax (the challenge north of the border is to ensure that those affected actually submit a claim for a DHP).

Discretionary Housing Payments have played a key role in some significant cases in recent years. Claimants and advisers could reasonably hope that the judgment in *Burnip v Birmingham City Council and another and other appeals* [2012] EWCA Civ 629, would be followed in bedroom tax appeal cases. This appeal dealt with Local Housing Allowance (LHA) and the discriminatory impact on disabled children. Henderson J held that "housing, by its very nature, is likely to be a long term commitment". Given that DHPs are discretionary, unpredictable and short-term it was found that discrimination against disabled children could not be justified by the existence of discretionary housing payments. These principles were not followed in *R (SG and others (previously JS and others)) v Secretary of State for Work and Pensions (SSWP)* [2015] UKSC16, 18 March 2015. Two mothers fleeing domestic violence argued that the benefit cap had an unjustifiably discriminatory impact on women, contrary to Article 14 of the European Convention on Human Rights. In dismissing the appeal it was held that the benefit cap was a proportionate means of meeting legitimate aims – it should not be a matter for the court to pass judgment on decisions made by "democratically elected institutions" in relation to the welfare benefits budget. It was held that the issues presented by the appeal were "capable of being addressed under the DHP Regulations" and "whether problems are avoided in practice will depend upon how the discretionary payments scheme is operated by local authorities in individual cases." (para 62)

This brings us to the cases of *R (MA and others) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13, 21 February 2014, and *R (Rutherford and Todd) v Secretary of State for Work and Pensions* [2016] EWCA Civ, 29. The Supreme Court heard these cases from 29th February to 02nd March 2016 and will make a final ruling; we are waiting for the judgment to be handed down. The path that these two cases have taken before reaching the Supreme Court is interesting. The Court of Appeal decided in the MA case that the availability of DHPs did justify discrimination against disabled claimants affected by the bedroom tax. In the Rutherford's case the Court of Appeal rejected the Government's assertion that the award of a DHP for these claimants justified discrimination (it was held that DHPs could not satisfactorily plug the financial gap resulting from the under-occupation charge). The facts of these two cases are presented below:

- In the MA case it was held the government was justified in discriminating against disabled claimants and reducing their housing benefit through the bedroom tax. The Court of Appeal held that the government had complied with the Equality Act 2010 and the Human Right Act 1998. Multiple judicial review applications were brought against the SSWP by disabled claimants. A variety of different facts were presented by the claimants including the inability to share a bedroom with a partner due to a disability and the need for a spare room because

of specialist equipment relating to a disability. The appeal was dismissed on the basis that the availability of DHPs justifies any discrimination and that the government has increased the DHP budget and issued clearer guidance to local authorities about how it should be administered. The thirty eight page judgment examined, in great detail, the political and administrative processes that led to the introduction of the bedroom tax and subsequent increases in the DHP budget. Lord Justice Longmore was satisfied that full consideration had been “given by the Government to the reform of housing benefit for working age claimants who occupy a larger property than warranted by the size of their household while seeking to protect those who are vulnerable and have the highest level of need.”. The completion of both an Impact Assessment and Equality Impact Assessment (which included consideration of the use of DHPs) was considered important. Having being involved in completing Equality Impact Assessments in a local government setting I am not sure that I would share the opinion that these should be considered “substantial and not unimpressive documents.” The following quote (from para 98) is particularly interesting when read in the light of Iain Duncan Smith’s resignation and the concerns he has subsequently raised about the impact of benefit cuts for the disabled:

“The position of the disabled was a vital concern in the minds of policy makers at the Department between the date of the Budget Statement in June 2010 and the making of the Regulations in December 2012 and, for myself, I have little difficulty in accepting that the Department did indeed have due regard to the need to eliminate discrimination”

- In the Rutherford’s case the Court of Appeal found that the bedroom tax unlawfully discriminates against children with disabilities. Paul and Susan Rutherford care for their 15 year old grandson Warren, who has a rare genetic disorder leading to severe physical and cognitive impairment. Warren requires 24 hour care by at least two other people. Due to their own disabilities the Rutherfords are unable to provide this level of care and rely on two paid carers who stay overnight at least twice a week. The family live in a specially adapted three bedroom property – one bedroom for Paul and Susan Rutherford, one bedroom for Warren Rutherford and a third bedroom for the overnight carers and storage of specialist equipment. Under the bedroom tax rules the Rutherfords are judged to be under-occupying their property as the third room used by the overnight carers is judged to be a “spare” room. The regulations permit the use of an additional bedroom for overnight carers if this is required by an adult claimant (or their partner) but not if the additional room is required by overnight carers who look after a child. The Government’s position is that discrimination is justified as the Rutherfords have not suffered any financial hardship as they can rely on a discretionary housing payment. In representing the Rutherfords Child Poverty Action Group successfully argued that discretionary housing payments are not an adequate, reliable and ongoing source of financial support. This was highlighted by the fact that the Rutherfords were refused a DHP by their local authority when they first made a claim. Two charities (Carers UK and the Papworth Trust) gave evidence in support of the Rutherfords and highlighted the unreliability of DHPs. Carers UK cited a case where they supported a single mother looking after her severely disabled daughter who required 24 hour care following spinal surgery. A “spare” room was used by the disabled child’s aunt. In this case the local authority awarded a DHP for a temporary period, but then refused subsequent claims and told the applicant not to expect an appeal to succeed. The Papworth Trust, a charity for the disabled and social landlord, presented evidence that they had collated which indicated DHPs were not working in the way that the Secretary of State intended for disabled children. At paragraph 73 the Court of Appeal concluded “the Secretary of State cannot in the case of the need for accommodation for the carers of disabled children demonstrate that DHPs will always be available. Furthermore it is regrettable that the position of carers for disabled

children is not expressly dealt with in the Guidance which addresses the position only where there is specially adapted accommodation.”

The decision of the Supreme Court in the MA and Rutherford cases will not only be significant in terms of clarifying the position of disabled claimants affected by the bedroom tax, but will also put an important marker in the sand about “vulnerability” and who is deserving of state support. When analysing the technicalities of the how the bedroom tax is implemented it can be easy to overlook that this is a policy which is about redefining the role of social housing and who the state should fund to occupy it. The bedroom tax and the Housing and Planning Bill^{vi} (currently at committee stage in parliament) can leave us in no doubt that the present government believe the way out of the current housing crisis is not through the expansion of the social rented sector but by transforming us from “generation rent into generation buy”. The bedroom tax is being defended by the government in the highest court in the land because they firmly believe that the debate about who should live in social housing is about a “fair deal” for the taxpayer as much as securing suitable accommodation for the vulnerable.

In the last few years there have been important decisions elsewhere in the social welfare law sector which have redefined vulnerability. Perhaps the most significant was the Supreme Court decision in *Hotak v London Borough of Southwark*; *Kanu v London Borough of Southwark* and *Johnson v Solihull Metropolitan Borough Council* [2015] UKSC 30, relating to homelessness decisions. This decision dealt with who should be viewed as vulnerable (and therefore in priority need) under part VII of the Housing Act 1996. Advisers and campaigners had for many years argued that the when judging vulnerability local authorities had set an unnecessarily high bar. The Supreme Court held that when deciding if someone is vulnerable the comparator should be with an ordinary person in need of accommodation and not ordinary street homeless people (who are by definition amongst the most vulnerable people in society). The implications for decision makers are clear – vulnerability is not about a race to the bottom and standards should not be set with the express purpose of excluding people from support. Furthermore, the Supreme Court held that when assessing vulnerability local authorities should not take into account their own finite resources – it is regrettable that discretionary housing payment decisions cannot be made on similar lines.

The analysis of bedroom tax appeals and the role of discretionary housing payments should be part of a wider examination of the exclusion faced by many vulnerable people. An excellent article (“Rights, responsibilities and refusals: Homelessness policy and the exclusion of single homeless people with complex needs”) in *Critical Social Policy* 35 (1) ^{vii} focuses on the interaction between homeless people and local authorities. When it describes how legislation setting out “legally enforceable rights” can be compromised by discretionary powers being handed down to decision makers who adopt gatekeeping approaches, it could just as easily be describing the adjudication of discretionary housing payments as homelessness decision making. The article strongly argues that marginalised people are routinely excluded from the services they need and have “multiple needs and exclusions”. The Staffordshire University research into the impact of the bedroom tax evidenced these multiple needs/exclusions where tenants who were under-occupying were often also hit by cuts to disability benefits and reductions in council tax support, relied on food banks and found themselves socially isolated. The results of a major research project undertaken by Sheffield Hallam University were published in March 2016 under the title “The Uneven Impact of Welfare Reform”^{viii}. One of the key findings of the research is that the post 2015 welfare reforms will hit working-age tenants in the social rented sector particularly hard (on average losing £1,700 a year compared to £290 a year for working-age owner occupiers). It is clear that those affected by the bedroom tax will continue to need the support of professionals in the social welfare law sector.

ENDNOTES

ⁱ Ipsos MORI/ Cambridge Centre for Housing and Planning Research (2014) "One year on: the impact of welfare reform on housing association tenants." Available on The National Housing Federation website: <https://www.housing.org.uk/resource-library/browse/one-year-on-the-impact-of-welfare-reforms-on-housing-association-tenants/>

ⁱⁱ Ipsos MORI/Cambridge Centre for Housing and Planning Research (2015) "Evaluation of the removal of the spare room subsidy" Available on the University of Cambridge website: <http://www.cam.ac.uk/research/news/areas-of-britain-most-affected-by-bedroom-tax-are-hardest-to-downsize-in-research-finds>

ⁱⁱⁱ Discretionary Housing Payments Guidance Manual. Available at: <https://www.gov.uk/government/publications/discretionary-housing-payments-guidance-manual>

^{iv} Stoke-on-Trent City Council Discretionary Housing Payments Policy. Available at: <http://www.stoke.gov.uk/ccm/content/advice/benefits/discretionary-housing-payments.en;jsessionid=aPCgQ4W55Ege>

^v Discretionary Housing Payments Government Contribution 2016/17. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/497986/s1-2016.pdf

^{vi} Housing and Planning Bill 2015-16, available at: <http://services.parliament.uk/bills/2015-16/housingandplanning.html>

^{vii} Peter Dwyer, Graham Bowpitt, Eva Sundin, Mark Weinstein (2015) "Rights, responsibilities and refusals: Homelessness policy and the exclusion of single homeless people with complex needs" Critical Social Policy, vol 35 (1). Available at: <http://csp.sagepub.com/content/35/1/3.abstract>

^{viii} Christina Beatty and Steve Fothergill - Sheffield Hallam University (2016) "The uneven impact of welfare reform. The financial losses to places and people" Available at: <http://www.shu.ac.uk/research/cresr/sites/shu.ac.uk/files/welfare-reform-2016.pdf>